Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DFA INVESTMENT DIMENSIONS GROUP INC.,
STATE STREET BANK & TRUST COMPANY,
AND PNC BANK, N.A.,

Petitioners,

v.

MUNFORD, INC.,

Respondent.

DANNE´ BROKAW MUNFORD, as Executrix of The Estate of Dillard Munford; JAMES M. CARROLL; RUSSELL FELLOWS; JOSEPH W. HARDIN; JAY RUBEL; HERBERT J. DICKSON; ROBERT M.GARDINER; RICHARD K. LEBLOND, II; AND S.B. RYMER, JR.,

Petitioners,

v.

MUNFORD, INC.,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION

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STATUTORY PROVISIONS INVOLVED

Section 546(e) of the Bankruptcy Code, 11 U.S.C. § 546(e) (1994), provides as follows:

§546 Limitations on avoiding powers.

(e) Notwithstanding sections 544, 545, 547, 548(a)(2), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency, that is made before the commencement of the case, except under section 548(a)(1) of this title.

Section 741(8) of the Bankruptcy Code, 11 U.S.C. § 741(8) (1994), provides as follows:

§741 Definitions for this subchapter. In this subchapter--

(8) "settlement payment" means a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade.

Section 550(a) of the Bankruptcy Code, 11 U.S.C. § 550(a) (1994), provides as follows:

§550 Liability of transferee of avoided transfer.

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may

recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from --

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

Section 18-2-22(3) of the Official Code of Georgia Annotated, O.C.G.A. § 18-2-22(3) (1991), provides as follows:

The following acts by debtors shall be fraudulent in law against creditors and others and as to them shall be null and void:

(3) Every voluntary deed or conveyance, not for a valuable consideration, made by a debtor who is insolvent at the time of the conveyance.

STATEMENT OF THE CASE

Petitions separately filed by two groups of defendants[1]

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[1] Petitioners in **No. 97-550**, DFA Investment Dimensions Group, Inc. ("DFA"), State Street Bank & Trust Company and PNC Bank, N.A., are collectively referred to hereinafter as the "DFA Petitioners". Petitioners in **No. 97-591**, Danne' Brokaw Munford, as Executrix of the Estate of Dillard Munford, James M. Carroll, Russell Fellows, Joseph W. Hardin, Jay Rubel, Herbert J. Dickson, Robert M. Gardiner, Richard K. LeBlond, II and S.B. Rymer, Jr., are collectively referred to hereinafter as the "Director and Officer Petitioners". The DFA Petitioners and the Director and Officer Petitioners are collectively referred to hereinafter as "Petitioners". Because the Petition for Writ of Certiorari filed by the Director and Officer Petitioners (the "Director and Officer Petition") is, in substance, virtually identical to the Petition for Writ of Certiorari

seek this Court's review of the Eleventh Circuit Court of Appeals' decision that section § 546(e) of Title 11, United States Code (the "Bankruptcy Code"), 11 U.S.C. § 546(e) (1994), does not, on the facts of this case, shield from avoidance as a fraudulent conveyance the funds paid by respondent Munford, Inc. ("Munford") to its shareholders in connection with the leveraged buyout of its stock ("LBO").

Munford provides the following summary of proceedings and contextual facts that were not adequately presented in the Petitions.

A. Proceedings Below

Munford filed a petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Georgia on January 2, 1990 (Case No. A90-00078). The bankruptcy filing occurred 13 months after Munford was acquired in an LBO, which closed on November 29, 1988. On June 17, 1991, acting as debtor in possession with the authority of a bankruptcy trustee pursuant to section 1107(a) of the Bankruptcy Code, 11 U.S.C. § 1107(a) (1994), Munford commenced this adversary proceeding in the bankruptcy court on behalf of the unsecured creditors injured by Munford's insolvency.

In Count I of its Amended Complaint (the only Count at issue here), Munford asserted fraudulent conveyance claims pursuant to federal law, section 544(b) of the Bankruptcy Code, 11 U.S.C. § 544(b) (1994), and Georgia law, O.C.G.A. § 18-2-22(3) (1991), against some of the shareholders who received LBO payments for their stock. Specifically, Munford sued its former officers and directors who received these payments (the

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filed by the DFA Petitioners (the "DFA Petition"), Munford hereby files a single Brief in Opposition to both the Director and Officer Petition and the DFA Petition (collectively, the "Petitions").

Director and Officer Petitioners) and its two largest, related, institutional shareholders (the DFA Petitioners).[2] Following lengthy discovery involving tens of thousands of documents and approximately 50 depositions, the Petitioners and other defendants filed motions for summary judgment in the bankruptcy court. On April 5, 1994, the bankruptcy court (Chief Judge Stacey W. Cotton) entered an order recommending to the United States District Court for the Northern District of Georgia, inter alia, that the summary judgment motions filed by the Petitioners with respect to Count I be denied.[3]

On August 10, 1994, the district court rejected the bankruptcy court's recommendation with respect to Count I and entered an order, inter alia, granting the summary judgment motions filed by the Petitioners, citing section 546(e) of the Bankruptcy Code.[4] On October 28, 1996, the Eleventh Circuit Court of Appeals reversed that decision, holding that section 546(e) of the Bankruptcy Code did not bar Munford's fraudulent conveyance claims on the facts of this case. Munford v. Valuation Research Corp. (In re Munford, Inc.), 98 F.3d 604, 609-10 (11th Cir. 1996).[5] On July 9, 1997, the Eleventh Circuit Court of Appeals entered an order denying the Petitioners' Petitions for Rehearing and Suggestions for Rehearing *En*

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[2] Under 11 U.S.C. § 544(b) (1994), a trustee [or, pursuant to 11 U.S.C. § 1107(a) (1994), a debtor in possession acting as a trustee] may avoid any transfer of the debtor that is voidable by an unsecured creditor under applicable law. Munford contends that the LBO payments the Petitioners received constituted fraudulent transfers under O.C.G.A. § 18-2-22(3) (1991), the applicable Georgia constructive fraudulent conveyance provision.

[3] The bankruptcy court's unreported opinion setting forth its recommendations is attached to the DFA Petition beginning at App. 52.

[4] The district court's unreported decision is attached to the DFA Petition beginning at App. 23.

[5] The Eleventh Circuit's decision is attached to the DFA Petition at App. 1.

Banc.[6]

B. Statement Of Facts

Before the LBO, Munford was an Atlanta-based, publicly traded company whose assets included a chain of Majik Market convenience stores and other retail chains. In late 1987, Munford's directors became interested in the possibility of selling the company. They retained Shearson Lehman Brothers Inc. ("Shearson") to evaluate Munford and to make recommendations regarding its future. In September 1987, Shearson presented a written financial report to the Director Petitioners that specifically recommended **against** an LBO or leveraged recapitalization. Shearson concluded that Munford could not carry the heavy debt load associated with a highly leveraged transaction in light of its financial condition and significant capital requirements.

Notwithstanding Shearson's express recommendation, the directors proceeded to approve just such a transaction with Deutschman & Co. ("Deutschman") in early 1988. Soon thereafter, however, Deutschman withdrew its LBO proposal after conducting its due diligence. Munford's directors were informed on March 3, 1988, that Deutschman, like Shearson, had concluded that Munford would not be able to repay the LBO debt that would be incurred and meet its capital requirements.

Following this aborted LBO proposal, Munford's financial condition continued to deteriorate. The company operated at a loss each month throughout 1988. In May 1988, however, the directors unexpectedly were presented with another LBO opportunity. Munford's board of directors,

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[6] The order denying the Petitions for Rehearing and Suggestions for Rehearing *En Banc* is attached to the DFA Petition at App. 112.

without reference to Shearson's earlier recommendation or Deutschman's conclusion, voted to accept this LBO proposal.

To effectuate the LBO, the acquiring group formed Alabama Acquisition Corporation ("AAC") and Alabama Merger Corporation ("AMC"), a wholly-owned subsidiary of AAC. Both AAC and AMC were shell corporations. Pursuant to the merger agreement, AMC and Munford were to merge, with Munford as the surviving corporation. On November 29, 1988, AAC acquired Munford for approximately $90 million. Substantially all of the money needed to fund the LBO came either from Munford's cash (and cash equivalents) or from a loan by Citicorp N.A. ("Citicorp") in excess of $53 million, for which all of Munford's assets were pledged as security.

In a series of simultaneous transactions, the LBO was consummated by merging AMC into Munford as the surviving corporation. As provided in section 3.1(a) of the merger agreement, all shares of Munford common stock owned by AMC were retired with no consideration exchanged for those shares. The remaining 3.9 million outstanding shares of Munford, including the shares owned by the Petitioners, were converted into the right to receive $17 per share. The funds to pay for these shares were deposited by Munford at Citizens & Southern Trust Company ("C&S"), to serve solely as "Paying Agent" (the title ascribed to it in the merger agreement). C&S, upon receipt of the tendered Munford shares, made the required payments to Munford's shareholders, including the Petitioners.

Munford was unable to meet its obligations, including paying the massive new debt to Citicorp, following the LBO. On January 2, 1990, 13 months after the LBO was consummated, Munford filed its petition for relief under Chapter 11 of the Bankruptcy Code.

C. The Court of Appeals Decision

The Eleventh Circuit Court of Appeals held that although C&S was a "financial institution," section 546(e) of the Bankruptcy Code does not shield from avoidance, as a fraudulent conveyance, the payments to the Petitioners in exchange for their Munford shares because the transfers were not made "by or to" C&S (or any other type of entity listed in section 546(e)). App. 12-13.[7] Because C&S was merely a conduit with no beneficial interest whatsoever in the funds passed by Munford through C&S to Munford's shareholders, the Eleventh Circuit held that the transfers were made "*by* Munford *to* shareholders." App. 12 (emphasis original).

REASONS FOR DENYING THE WRITS

The basis for the decision below undermines the Petitioners' request for review in this Court. Because the Eleventh Circuit Court of Appeals found it unnecessary to determine whether the payments to Petitioners in the Munford LBO constituted "settlement payments" within the meaning of section 546(e) of the Bankruptcy Code, a true and substantial conflict between the decision below and the Tenth Circuit Court of Appeals' decision in Kaiser Steel Corp. v. Pearl Brewing Co. (In re Kaiser Steel Corp.), 952 F.2d 1230 (10th Cir. 1991), cert. denied, 505 U.S. 1213 (1992), is not presented. Confronted with this problem, the Petitioners' assert that an argument rejected by the Tenth Circuit in Kaiser nevertheless directly conflicts with an argument allegedly accepted by the Eleventh Circuit in this case, namely that, despite the language of the statute, the challenged transfer must be "to" one of the types of entities listed in the statute, irrespective of whether it is "by" one

[7] Citations to "App. __" refer to the appendix attached to the DFA Petition.

of such entities. That, however, is not what the Eleventh Circuit held.

Not only have Petitioners failed to show a direct conflict between circuits, they also have failed to demonstrate any other compelling reason that would warrant this Court's review of the decision below. While the issues in this case are, of course, significant to the parties to the proceeding, the decision below does not present any clear opportunity for this Court, on review, to elucidate significant principles of fraudulent conveyance law.

Moreover, plainly, the Eleventh Circuit Court of Appeals in this case has not "so far departed from the accepted and usual course of judicial proceedings," Sup. Ct. R. 10(a), as to require this Court's review of its decision. Indeed, the Petitioners cannot demonstrate that the Eleventh Circuit's application of section 546(e) of the Bankruptcy Code to the facts of this case is incorrect. It is undisputed that section 546(e) was enacted to ensure the stability of the clearance and settlement system in the context of public transactions in the securities markets. Because the clearance and settlement system was entirely passive in this essentially private transaction between Munford and its shareholders, the overly expansive construction of section 546(e) urged by the Petitioners is improper.

I. Certiorari Is Not Warranted Because The Eleventh Circuit's Decision Does Not Directly And Substantially Conflict With The Tenth Circuit's *Kaiser* Decision.

The Petitioners incorrectly interpret the Eleventh Circuit's opinion as holding that section 546(e) is only applicable if the challenged transfer is made "to" one of the entities listed in that section (i.e., a transfer "by" such an entity is insufficient despite the express statutory language). DFA Petition at 10 ("[the Eleventh Circuit] erroneously held that Section 546(e) is only applicable to settlement payments made to one of the listed

entities.") (emphasis added); Director and Officer Petition at 9 (same). The Petitioners later interpret the Eleventh Circuit's opinion as holding that such transfers must be "by and to" one of the listed entities. DFA Petition at 18 (emphasis added); Director and Officer Petition at 14 (emphasis added). Neither interpretation is correct.

Though either of such conclusions might be in conflict with the reasoning of the Tenth Circuit in Kaiser, the Eleventh Circuit did not reach either of them. Rather, implicitly recognizing that the result cannot depend on the fortuitous circumstance of whether the object of the LBO itself writes the checks in payment to the shareholders or instead deposits the funds with a paying agent for administrative convenience, the Eleventh Circuit interpreted section 546(e) as inapplicable to mere conduits.

Thus, the Eleventh Circuit concluded that section 546(e) of the Bankruptcy Code was not implicated for reasons that were not even raised in the Tenth Circuit's Kaiser case. Specifically, the Eleventh Circuit found that the transfers in this case were not made "by or to" a commodity broker, forward contract merchant, stockbroker, financial institution or securities clearing agency:

> Here, the transfers/payments were made *by* Munford *to* shareholders. None of the entities listed in section 546(e) . . . made or received a transfer/payment. Thus, section 546(e) is not applicable.
>
> True, a section 546(e) financial institution was presumptively involved in this transaction. But [C&S] here was nothing more than an intermediary or conduit. Funds were deposited with the bank and when the bank received the shares from the selling shareholders, it sent funds to them in exchange. The bank never acquired a beneficial interest in either the funds or the shares.

App. 12 (emphasis original). The Eleventh Circuit found support for its conclusion in cases uniformly holding that mere conduits are not deemed to be substantive participants in the process of transfer under a related provision of the Bankruptcy Code, section 550.[8] By analogy, the payments in this case would be deemed made by and to the real parties in interest -- Munford and the shareholders, respectively. Accord, Brandt v. Hicks, Muse & Co. (In re Healthco Int'l, Inc.), 195 B.R. 971, 981-83 (Bankr. D. Mass. 1996).

As noted by the court in Healthco Int'l, 195 B.R. at 983, the Tenth Circuit in Kaiser did not consider the lack of beneficial interest by the intermediary, the argument apparently not having been raised. The Tenth Circuit's section 546(e) analysis in Kaiser focused instead on whether transfers made to selling shareholders in an LBO constituted "settlement payments" within the meaning of the statute. The Tenth Circuit concluded that they did. 952 F.2d at 1237-40. By contrast, the district court in Wieboldt Stores, Inc. v. Schottenstein, 131 B.R. 655, 663-65 (N.D. Ill. 1991), as well as the bankruptcy court in Healthco Int'l, 195 B.R. at 983, concluded that transfers made to selling shareholders in an LBO do not constitute "settlement payments" within the meaning of section 546(e) of the Bankruptcy Code.

This dispute, set up by the competing analyses in Kaiser and Wieboldt, has been the focus of numerous commentaries. Compare Neil M. Garfinkel, Note, No Way Out: Section 546(e) is no Escape for the Public Shareholder of a Failed LBO, 1991 Colum. Bus. L. Rev. 51; Gerald K. Smith and Frank R.

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[8] 11 U.S.C. § 550 (1994). See Nordberg v. Societe Generale (In re Chase & Sanborn Corp., 848 F.2d 1196, 1200 (11th Cir. 1988); Bonded Fin. Servs., Inc. v. European Am. Bank, 838 F.2d 890, 893 (7th Cir. 1988).

Kennedy, Fraudulent Transfers and Obligations: Issues of Current Interest, 43 South Carolina L. Rev. 709 (1992); William C. Rand, In re Kaiser Steel Corporation: Does Section 546(e) of the Bankruptcy Code Apply to a Fraudulent Conveyance Made in the Form of an LBO Payment?, 19 Fordham Urb. L. J. 87 (1991); and Jane Elizabeth Kiker, Judicial Repeal of Fraudulent Conveyance Laws: Kaiser Steel Corp. v. Charles Schwab & Co., 913 F.2d 846 (10th Cir. 1990), 14 Hamline L. Rev. 453 (1991) (all concluding that payments to selling shareholders in an LBO are not "settlement payments"), with Michael Cook, Brad J. Axelrod, and Geoffrey S. Frankel, The Judicially Created "Innocent Shareholder" Defense to Constructive Fraudulent Transfer Liability in Failed Leveraged Buyouts, 43 South Carolina L. Rev. 777, 801, 804 (1992) (finding Kaiser analysis "tenable," but noting that "insulating payments that are made to public shareholders from fraudulent transfer attack arguably does nothing to promote stability" in the clearance and settlement system).

The Eleventh Circuit's opinion in this case sidestepped this debate entirely. The Petitioners' statements that the Eleventh Circuit "found that the merger payments to shareholders constituted 'settlement payments' within the meaning of section 546(e)" are wholly inaccurate. DFA Petition at 12; Director and Officer Petition at 10. The Eleventh Circuit did not "find" that the LBO transfers were or were not "settlement payments" within the meaning of section 546(e). The court simply "presumed" that they were for the purpose of explaining its analysis on a different issue. App. 12. The Eleventh Circuit concluded on the facts of this case that "regardless of whether the payments qualify as settlement payments, section 546(e) is not applicable". Id.

Thus, the opinion below does not directly and substantially conflict with the Tenth Circuit's opinion in Kaiser, or with any other lower court decision on the specific issue

considered and resolved in this case. Indeed, the decision below does not even address the central section 546(e) issue debated by the Tenth Circuit and other courts, and by commentators, when considering the application of the statute to alleged fraudulent conveyances made in connection with an LBO. Without any direct and substantial conflict between circuits, review in this Court simply is not warranted.

II. Certiorari Is Not Warranted Because The Eleventh Circuit's Decision Has Minimal Significance Beyond This Case.

In alarmist fashion, the Petitioners argue that if Munford may avoid, as fraudulent conveyances, the LBO payments made to them in this case, the knowledge of this avoidance would "undermine investor confidence in the financial markets." DFA Petition at 15; Director and Officer Petition at 13. This unabashed hyperbole, however, is rather persuasively undermined by the absence of any evidence that this case has had any appreciable effect whatsoever on **any** investor's confidence in the financial markets during its entire pendency.

Munford notes that on October 28, 1996, the day the Eleventh Circuit issued its opinion in this case, the Dow Jones Industrial Average closed at 5972. Less than one year later, on October 21, 1997, it closed at 8060, an increase of approximately 35%. In the three and one-half years since the bankruptcy court issued its proposed conclusion of law that section 546(e) does not shield fraudulent transfers in this case from avoidance, the Dow Jones Industrial Average has more than doubled. Perhaps more telling is the performance of the mutual funds managed by Petitioner DFA. A sampling of the first five of its mutual funds found on the list DFA provided pursuant to Sup. Ct. R. 29.6 (App. 113) reveals that the value of such funds since the Eleventh Circuit's decision has increased by approximately 36%. Since the bankruptcy

court's proposed conclusion of law, the value of such funds has increased by approximately 95%. Thus, the performance of DFA's own mutual funds contradicts its assertion that the Eleventh Circuit's decision will "undermine investor confidence in the financial markets." DFA Petition at 15. [9]

The Petitioners further argue that Munford's avoidance of the alleged fraudulent conveyances made to them in this case "would seriously disrupt [the clearance and settlement] system". DFA Petition at 15; Director and Officer Petition at 13. The clearance and settlement system, however, was only incidentally involved in the LBO that occurred in this case.

The court in Wieboldt explained generally how the clearance and settlement system works:

> Typically, when a customer wishes to buy a security, he or she places an order with his or her broker, who purchases the security from another broker, who is acting on behalf of a party who has placed an order to sell. Once the trade has been agreed upon, the process by which the security is delivered in exchange for the purchase price is known as "clearance and settlement." The clearing agency compares the trades its member brokers have made to arrive at an accounting of the day's transactions, which it then uses to establish each broker's money and securities settlement obligations. Finally, the trades are "settled" - funds and securities

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[9] The current and historical market figures cited above, which are adjusted for stock dividends and stock splits, were obtained from Dow Jones or TRADELINE news services. This Court can take judicial notice of these facts pursuant to Fed. R. Evid. 201(b)(2). See, e.g., In re Verifone Secs. Litig., 784 F. Supp. 1471, 1475 n.2 (N.D. Cal. 1992), aff'd, 11 F.3d 865 (9th Cir. 1993).

Although the world stock markets have dipped and fluctuated recently, Munford trusts that the Petitioners will not ask this Court to attribute such movements to this case.

are delivered in satisfaction of the obligations.

131 B.R. at 664 n.9 (citations omitted). Thus, in ordinary public transactions involving the purchase and sale of securities, the clearance and settlement system is necessary to match buyers with sellers and to provide an efficient means of accountability. The clearance and settlement system serves as an accountant, coordinator and guarantor.

Munford agrees with the Petitioners that it is this system of guarantees, within the ordinary course of the public securities market, that section 546(e) was designed to protect. In the Munford LBO, however, the clearance and settlement system was entirely passive and only incidentally involved. The public market for purchasing and selling securities simply was not used. As the Eleventh Circuit noted, the intermediaries served only as passive conduits for Munford's payment to the Petitioners. The intermediaries did not, and could not, make the guarantees that would be required if the transaction had been an open market trade -- the type of transaction that section 546(e) was intended to protect. As the bankruptcy court in this case observed:

> [T]his was essentially a private transaction between Munford and its shareholders. The public market for buying and selling securities was not meaningfully implicated. The clearance and settlement system was involved only to the extent that DFA [ ] used financial intermediaries to hold its Munford stock. In that instance, the system was merely used as a convenient conduit to surrender their shares and obtain payment of the LBO consideration.

App. 89.

The Petitioners provide no cogent explanation, nor offer any concrete example, of any injury that would be caused to the securities market clearance and settlement

system by the return of the LBO payments they received. Purely and simply, a judgment that requires Petitioners to return the LBO payments will cause no repercussions through the system and pose no threat whatsoever to its stability.

Finally, the DFA Petitioners assert that compelling them to return fraudulently conveyed funds now would affect their mutual fund shareholders who may not have been investors at the time of the LBO. The assertion may be correct,[10] but the risk is simply one of a panoply of risks that may affect the value of a mutual fund, and, surely, a much less significant risk than swings in the market generally. Moreover, in this case, the DFA Petitioners, like all other shareholders, were specifically warned in the LBO proxy statement that they might be required to return their LBO payments if a court determined that they were fraudulent conveyances.

The Petitioners' arguments regarding the effect of the decision below on the securities markets and the clearance and settlement system are vastly overstated, at best. This case does not present a compelling issue that warrants review.

III. Certiorari Is Not Warranted Because the Eleventh Circuit Properly Rejected Petitioners' Request For An Expansive Construction Of Section 546(e).

The Eleventh Circuit Court of Appeals in this case plainly has not "so far departed from the accepted and usual

[10] The DFA Petitioners' fund managers have their own worth, derived, for example, from administrative fees charged to their investors. There is no reason why the DFA Petitioners could not refund the LBO payments from their own resources, rather than passing the costs on to current investors.

course of judicial proceedings," Sup. Ct. R. 10(a), as to merit review in this Court. Indeed, the Petitioners cannot demonstrate that the Eleventh Circuit's application of section 546(e) of the Bankruptcy Code to the facts of this case is incorrect.

The DFA Petitioners assert that "the court of appeals incorrectly concluded that Section 546(e) only protects those types of entities specifically listed." DFA Petition at 17. This assertion reflects Petitioners' request, contrary to proper canons of statutory construction, for an expansive interpretation of the statute. Where, as here, the underlying law (fraudulent conveyance law) serves a broad **remedial** purpose,[11] any statutory exception to that remedy should be construed narrowly, rather than expansively. Piedmont & Northern Ry. v. Interstate Commerce Comm'n, 286 U.S. 299, 311-12 (1932).

Indeed, courts uniformly have held that exceptions to avoidance provisions in the Bankruptcy Code should be construed narrowly. See, e.g., Florida Steel Corp. v. Stober (In re Industrial Supply Corp.), 127 B.R. 62, 65 (M.D. Fla. 1991), aff'd, 961 F.2d 1582 (11th Cir. 1992) ("the court . . . should narrowly interpret [the § 547(c)(2) "ordinary course" exception to preference avoidance]"); J.P. Fyfe, Inc. of Fla. v. Bradco Supply Corp. (In re J.P. Fyfe, Inc. of Fla.), 96 B.R. 474, 476 (D. N.J. 1988), aff'd, 891 F.2d 66 (3d Cir. 1989) ("the court notes that it should not give untrammeled access to section 547(c)(2), but should construe the statute narrowly"); 222 Liberty Assocs. v. Prescott Forbes Real Estate Corp. (In re 222 Liberty Assocs.), 110 B.R. 196, 203 (Bankr. E.D. Pa. 1990) ("the exceptions [to avoidance of post-petition transactions] set forth in §§ 549(b) and (c) must be narrowly construed").

Further, the expansive construction of section 546(e)

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[11] See, e.g., In re Best Prods. Co., 168 B.R. 35, 57 (Bankr. S.D.N.Y. 1994), appeal dismissed, 177 B.R. 791 (S.D.N.Y.), aff'd, 68 F.3d 26 (2d Cir. 1995).

that Petitioners urge here, to support the statute's application to the facts of this case, would inappropriately and unnecessarily expand the scope of the statute beyond the transactions it was designed to protect. Section 546(e) was added by the 1982 Bankruptcy Amendments, Pub. L. No. 97-222, 96 Stat. 235 (the "1982 Amendments") to "clarify and, in some instances, broaden the commodities market protections and expressly extend similar protections to the securities market." H. Rep. No. 97-420 to accompany H.R. 4935, 97th Cong., 2d Sess. 1, 2 (1982), reprinted in 1982 U.S.C.C.A.N. 583, 583. The "commodities market protections" referred to were contained in section 764(c) of the Bankruptcy Code [the predecessor to section 546(e) which was simultaneously repealed with the enactment of section 546(e)]. Pub. L. No. 97-222 § 17(c). Section 764(c) was enacted in 1978 to prevent the result achieved in Seligson v. New York Produce Exch., 394 F. Supp. 125 (S.D.N.Y. 1975), where the court refused to find that a $12 million margin payment by a bankrupt commodities broker was exempt from the avoiding powers of the broker's trustee in bankruptcy. S. Rep. No. 95-989 at 106 (1978), reprinted in 1978 U.S.C.C.A.N. 5787. The House Report accompanying the Bankruptcy Code addressed section 764(c) as follows:

> Subsection (c) insulates variation margin payments and other deposits from the avoiding powers except to the extent of actual fraud under section 548(a)(1). This facilitates prepetition transfers and protects the ordinary course of business in the market.

H. Rep. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. 392 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6348 (emphasis added). As noted above, section 764(c) was repealed simultaneously with the enactment of section 546(e) by the 1982 Amendments. The stated purpose of the 1982 Amendments was "to minimize the displacement caused in the commodities and

securities markets in the event of a major bankruptcy affecting those industries." H. Rep. No. 97-420 to accompany H.R. 4935, 97th Cong., 2d Sess. 1 (1982), reprinted in 1982 U.S.C.C.A.N. 583, 583. The House Report summarized the bill as follows:

> The commodities and securities markets operate through a complex system of accounts and guarantees. Because of the structure of the clearing systems in these industries and the sometimes volatile nature [of] the markets, certain protections are necessary to prevent the insolvency of one commodity or security firm from spreading to other firms and possibly threatening the collapse of the affected market.
>
> The Bankruptcy Code now expressly provides certain protections to the commodities market to protect against such a "ripple effect." One of the market protections presently contained in the Bankruptcy Code, for example, prevents a trustee in bankruptcy from avoiding or setting aside, as a preferential transfer, margin payments made to a commodity broker (see 11 U.S.C. Sec. 764(c)).
>
> The thrust of several of the amendments contained in H.R. 4935 is to clarify and, in some instances, broaden the commodities market protections and expressly extend similar protections to the securities market.

Id. at 1, 2, 1982 U.S.C.C.A.N at 583.

This legislative history of section 546(e) (including the legislative history of its predecessor, section 764(c)) indicates that it was not the players in the clearance and settlement system that needed protection, but the system itself. See Wieboldt, 131 B.R. at 665 ("[it was] the system which Section 546(e) was designed to protect"). An understanding of this clearance and settlement system coupled with the legislative purpose of section 546(e) establish that section 546(e) was not intended to

encompass payments to shareholders through passive intermediaries in LBO transactions. Section 546(e), therefore, should not apply where, as in this case, the clearance and settlement system that it was designed to protect is only incidentally involved in the particular transaction, and there was not even a remote threat of any insolvency involving a commodities or securities firm that might ripple through the clearance system for securities transactions.

While the goal of section 546(e) -- protection of the securities market clearance and settlement system -- is not advanced by precluding fraudulent conveyance liability in this case, the remedial goal of fraudulent conveyance law -- the fair treatment of unsecured creditors -- would be wholly frustrated by insulating the transactions at issue. As the Third Circuit Court of Appeals observed in Moody v. Security Pac. Business Credit, Inc., 971 F.2d 1056, 1073 (3d Cir. 1992), "[a]t least from the viewpoint of the unsecured creditor, leveraged buyouts present great potential for abuse." Id. at 1073. The court concluded: "we believe failed leveraged buyouts merit close scrutiny under the fraudulent conveyance laws." Id. Similarly, the court in Crowthers McCall Pattern, Inc. v. Lewis, 129 B.R. 992, 997-98 (S.D.N.Y. 1991), stated: "[a] leveraged buy out ... can harm creditors in exactly the way fraudulent conveyance laws are designed to prevent." 129 B.R. at 998. The Eleventh Circuit's determination that section 546(e) should not and does not bar fraudulent conveyance recovery in this case was correct.

Finally, the DFA Petitioners' appeal to equity, arguing that avoidance of the alleged fraudulent conveyance they received would be unfair because they were only passive participants in the LBO, is unavailing. Their equitable appeal, even if it were supportable, is irrelevant, both because it does not raise a compelling issue for review in this Court and because the intent or knowledge of the recipient of the conveyance is irrelevant in a constructive fraudulent conveyance action. See

Brown v. Citizens & Southern Nat'l Bank, 317 S.E.2d 180, 183 (Ga. 1984); Leachman v. Cobb Dev. Co., 172 S.E.2d 688, 689 (Ga. 1970).

Moreover, the DFA Petitioners' equitable appeal, even if it were relevant, is unsupported by the facts of this case. The proxy statement distributed to the DFA Petitioners in connection with the proposed LBO provided extensive information regarding the highly leveraged nature of the proposed transaction and the significant financial risks to Munford. Indeed, in two separate sections (including the introductory "Summary"), the LBO proxy statement **specifically disclosed the risk of a fraudulent conveyance action** that might "require that former shareholders of the Company return" the payments received for their shares in connection with the LBO. Nevertheless, Munford's board of directors (including each of the Director Petitioners), under whose supervision the LBO proxy statement was prepared, and the DFA Petitioners (highly sophisticated institutional investors) voted to approve the LBO. Unlike the Petitioners, Munford's unsecured creditors injured by the LBO, including worker's compensation claimants and convenience store property lessors, had no opportunity to vote for or against the transaction. In light of the vast injuries sustained by unsecured creditors who were left with claims worth pennies on the dollar, the Petitioners' appeal to fairness is hollow.

CONCLUSION

The Petitioners' arguments that the court of appeals misapplied section 546(e) of the Bankruptcy Code to the facts of this case would not warrant review in this Court even if the arguments were correct. The Petitioners have not demonstrated any compelling cause for this Court to exercise its discretion to grant the Petitions. Accordingly, the Petitions should be denied.

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Respectfully submitted,

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